



Wisconsin Transportation Builders Association
"Connecting Wisconsin to the World"

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WTBA Testimony
Assembly Committee on Housing
Public Hearing – AB-466

Tom Walker, Director of Government Affairs
Wisconsin Transportation Builders Association

January 24, 2008

Good afternoon, Chairman Wieckert and members of the Committee. Thank you for the opportunity to testify on AB-466 today.

WTBA is a statewide organization of more than 260 contractors, consultants, and associated businesses. Our members design, build, rehabilitate, improve, reconstruct, expand and modernize every form of transportation infrastructure, including state and local roads and bridges, airports, railroads, and bicycle and pedestrian infrastructure. Most of our contracting members are multi-generational Wisconsin companies that employ numerous workers and pay family supporting wages and benefits.

One of WTBA's primary responsibilities is to work with the Legislature and state agencies on an appropriate regulatory framework that protects contractors, construction workers, communities, consumers, and the environment.

I am here today to testify against AB-466 as drafted.

As we read the bill, the clear intent is to improve the regulatory environment and provide consumer protection on housing projects. The Department of Commerce has the appropriate expertise and responsibility for this type of construction, and does a fine job in meeting its responsibilities for buildings.

Yet, as drafted, our members would be required to register with Commerce as contractors, despite the fact that they do not work on buildings, apply for building permits, or deal with the structural, mechanical, roofing, plumbing, HVAC, or electric elements of a building.

Our members work almost exclusively on state and local transportation infrastructure, which we call horizontal construction. These projects follow Department of Transportation contract provisions directly on DOT-administered state and local projects and indirectly by local government use of state DOT specs. DOT is "our" regulatory agency, much like commerce is for building contractors.

Our members understand and support the importance of state agency oversight. But we believe that transportation construction is appropriately DOT's responsibility.

Since it is very broadly drafted, we believe that transportation contractors are clearly, but inadvertently covered and required to register with the Department of Commerce, and meet their requirements. We believe that this was not the intent of the sponsors.

Therefore, we would like to work closely with this Committee, Representative Kaufert, and other stakeholders to make appropriate changes excluding transportation contractors from the scope of the proposed bill, before it moves forward.

In the Senate Companion Bill, SB-228, SA-1 fixed the problem we raised, by focusing precisely on buildings. We ask that the Committee take a good look at this positive approach. WTBA has no position on SB-228 as passed by the Senate. It is not our issue.

Thank you for the opportunity to come before you today. I would be pleased to answer any questions.



Wisconsin Builders Association

January 23, 2008

TO: Members of the Assembly Housing Committee

FROM: Brad Boycks
Director of Government Affairs
Wisconsin Builders Association®

RE: **Opposition to Assembly Bill 466, relating to the regulation of construction contractors and subcontractors.**

The Wisconsin Builders Association opposes Assembly Bill 466. We believe another credentialing system at the Department of Commerce for contractors and remodelers is unnecessary and redundant in light of the passage of a builder education program last session.

The Wisconsin Builders Association worked with members of the legislature last session to pass a comprehensive package that requires both new builders and those that have worked in the industry for years to take initial "new builder" and continuing education classes.

2005 Wisconsin Act 200 created:

- A requirement for contractors and remodelers to maintain a minimum amount of continuing education (6 hours per year, recently amended to 12 hours every two years).
- Regulations so contractors can not obtain a building permit without showing proof of continuing education – in the form of a newly created credential (Qualifier Credential).
- Clear situations in which a contractor can have their credentials revoked or suspended if they do not meet the education requirements put forth in 2005 Wisconsin Act 200.

Enclosed are a number concerns and questions we have concerning Assembly Bill 488.

- What problem is this bill trying to solve? Authors of this bill have stated that this bill will address "the growing problem in the construction industry of workers being misclassified as independent contractors in order to avoid paying taxes, unemployment, or workers compensation insurance on those workers." Enforcement of laws regarding taxation, unemployment compensation and workers compensation insurance are not dealt with by the Department of Commerce and are never actually addressed in this bill.
- This bill leaves too much authority to the Department of Commerce and the rule making process to establish standards and presumably fines for those contractors and subcontractors that are deemed in violation.
- The "Contractor Advisory Committee" is not truly an independent body because all of the appointees are made by the Secretary of Commerce.
- Commerce should not be given the power to directly access a forfeiture against a contractor or subcontractor.

Again, the over 9300 members of the Wisconsin Builders Association urge your opposition to Assembly Bill 488.



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Contractor Registration SB 228

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DESCRIPTION: This legislation is a response to the growing problem in the construction industry of employers fraudulently misclassifying workers as independent contractors. Rather than pay their workers as employees, contractors are handing them 1099 Tax Forms and paying them as independent contractors. Contractors who fraudulently misclassify their employees have a competitive advantage because they do not withhold federal and state taxes or pay unemployment or workers compensation insurance. Not only are these costs illegally shifted to the individual worker, the "independent contractor" loses the protection of various employment laws (minimum wage and overtime requirements, workers compensation, etc.) We are seeing more and more instances of this illegal practice being used by framing, drywall, roofing, siding, and flooring covering contractors.

We believe the best way to deter contractors from fraudulently misclassifying workers as independent contractors is to require all contractors in the state of Wisconsin to register with the Department of Commerce (DOC). This bill also will allow consumers to search the DOC website to determine whether they are hiring a legitimate contractor.

TALKING POINTS:

SB 228 as passed by the Senate will do the following:

- Requires the Department of Commerce (DOC) to register any person who desires to act as a contractor or subcontractor and who meets certain registration requirements established by DOC.
- Requires DOC to promulgate rules establishing standards for the registration of contractors and subcontractors, application procedures for persons who apply for such registration, and conditions under which DOC may suspend or revoke such a registration.
- Creates a contractor advisory committee to make recommendations to DOC regarding the promulgation of these rules.
- Provides that a person may not act as a contractor or subcontractor or perform construction services unless the person is registered as a contractor or subcontractor by DOC.

- Prohibits a contractor or subcontractor from claiming a lien for construction services performed or materials procured if the contractor or subcontractor is not registered with DOC.
- Requires DOC to establish an internet site that consumers may use to determine whether a contractor or subcontractor is registered.
- Requires registered contractors to display their registration number on all construction bids and advertising.
- Authorizes DOC to directly assess a forfeiture by issuing an order against any person who violates the bill's requirements.
- Prohibits any contractor or subcontractor from coercing or inducing a person to falsely declare he or she is an independent contractor.
- Exempts anyone performing construction work on his or her own property.
- Provides that, if a person applies for another approval from Commerce, Commerce must issue a combined approval that confers the privileges and responsibilities of the registration required under the bill and the privileges and responsibilities of the other approval.
- Directs Commerce to inform Departments of Revenue and Workforce Development when it has reason to believe that a person has violated the prohibition on coercing or inducing a person to falsely declare that he or she is an independent contractor.

Discussion Points:

- **Misclassification is costing Wisconsin millions in uncollected taxes, unemployment insurance and workers compensation premiums.** A 2004 Harvard study of the construction industry in Massachusetts estimated that 14 to 24% of employers misclassify their workers at a cost of \$21 million to the state. A 2005 state audit* of all Illinois employers revealed a 19.5% rate of misclassification—or 63,666 employers, of which over 7,000 were construction employers. It is estimated that the unemployment insurance system in Illinois lost \$53.7 million in 2005. Misclassified independent contractors, according to published data, are also known to underreport their personal income by as much as 30% resulting in lost income tax revenue. In just 2005, that came to \$149 million of income tax not collected in Illinois. (*Data provided by the Illinois Department of Employment Security for a project funded by the National Alliance for Fair Contracting—a labor/management group promoting compliance with all applicable laws in public construction.)

- While misclassifying workers as independent contractors is already illegal, enforcement is difficult. Requiring registration of all contractors and creating a database of contractors, will create a better mechanism for enforcement.
- Registration is a simple way for the state and consumers to accurately identify real contractors and subcontractors.
- Registration protects contractors who are following the law and levels the playing field for all contractors. Studies show that contractors who misclassify have a 15-40% competitive advantage in bidding work over competitors who properly classify their workers as employees.
- Many of the workers being exploited by misclassification are illegal immigrants who have no recourse but to accept their situation for fear of calling attention to their immigration status.
- Contractors who pull permits for construction of one and two family dwellings are already required to register with the DOC and demonstrate financial responsibility. Because this mechanism is already in place, establishing the registration requirement will not impose an undue administrative or fiscal burden. The DOC has indicated expanding current requirements to all contractors is feasible. A website listing one and two family dwelling contractors registered with DOC already exists.
- This legislation applies only to construction contractors. The bill is not a licensure proposal. In fact, we have more stringent standards for individuals making a living as manicurists and barbers.
- **The Department of Commerce estimates that the cost of the Contractor Registration fee is expected to be \$15.00 for a four year registration**
- Roadbuilding, and utility contractors will not be required to register under the bill.

THE DAILY REPORTER

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Supreme Court rules in favor of sub

Joe Grundle, joe.grundle@dailyreporter.com

January 31, 2007

A Wisconsin Supreme Court ruling Thursday reaffirmed that the burden of proof in determining employee status for workers' compensation premiums falls on insurance companies.

In Acuity Mutual Insurance Company v. Miguel A. Olivas, the justices upheld a ruling from the Court of Appeals but did so on different grounds.

"We were happy with the Court of Appeals' ruling but thought they made it for the wrong reason," said Olivas' attorney Ness Flores of Flores and Reyes Law Offices, Waukesha. "We thought Olivas was covered by the act, not just common law, and the Supreme Court adopted our rationale completely."

The case involved Sheboygan drywall subcontractor Miguel Olivas, who was assigned jobs by Steve Ten Pas, owner of Ten Pas Drywall. As an independent contractor and not an employee of Ten Pas, Olivas had to secure his own liability and workers' compensation insurance, which he did through Acuity.

Olivas and a crew of five Spanish-speaking men then worked the jobs together. The unusual joint venture between Olivas and Ten Pas was formed because the workers in question were illegal immigrants.

Because Ten Pas didn't directly contract with any of the workers other than the documented Olivas, he did not perform background checks on them.

Premiums raised

When Acuity audited Olivas' contract, it determined the men working with him were not independent contractors, and therefore his employees, so they raised Olivas' premium and billed him an additional \$32,000.

Olivas refused to pay on the basis that the men were not his employees rather simply co-workers, and Acuity sued.

The Court of Appeals ruled that Acuity failed to distinguish whether or not the workers were employees or self-employed contractors under common-law criteria, which is less stringent than the state's Workers' Compensation Act, and ruled in favor of Olivas.

The Supreme Court disagreed with the lower court, finding that the WCA did apply and agreeing with Acuity that the men did not meet the act's nine-point test required to establish themselves as independent contractors.

However, because Acuity was unable to prove the workers were actually employees of Olivas and not Ten Pas, who Acuity had no contract with, the Supreme Court still ruled in favor of Olivas by a vote of 4-3.

Not employees

Chief Justice Shirley Abrahamson wrote: "Simply concluding that the workers at issue are employees and not exempt independent contractors within the act does not mean that Acuity can collect additional insurance premiums from Olivas for the workers at issue. A sufficient nexus must exist between Olivas and the workers to enable this court to conclude that the workers are in the service of Olivas."

"Olivas' worker's insurance policy does not cover every person who is an employee of some employer; it covers only employees in the service of Olivas."

Acuity contended that it would be liable under Olivas' policy -- which included a clause protecting "Olivas' employees" -- if one of them got hurt on the job. Still, the court ruled, Acuity had to sufficiently prove that the workers fell under the category of "Olivas' employees" and didn't.

Acuity determined the men were Olivas' employees because he distributed 1099 forms to the men. The defense countered that it was Ten Pas who was the real employer. He decided how much each drywall job would pay by its size and complexity, and he issued a 1099 income tax form to Olivas, who made copies and distributed them to his co-workers. Ten Pas paid Olivas, who then split his earnings with his crew.

The court ruled that the men were not employees of Olivas because he did not set their pay, did not profit off the workers, did not tell them when to start or stop working, did not pay them benefits, did not provide them tools, and had no power to hire or fire them.

"Acuity said that because the men were not independent contractors, that must make them automatically employees of Olivas, so he's responsible (for higher premiums)," said Flores. "But even if they are not independent contractors, you have to show they fall under Olivas before you can make him responsible."

"There has to be an employer-employee relationship that exists, and we had evidence to the contrary."

Distributed pay to workers

Acuity's contract with Olivas, whose initially calculated premium payment was \$3,513, was based on his estimated annual earnings of \$25,000. But when Acuity discovered Olivas had received about \$190,000 from Ten Pas, which Olivas distributed to his crew, it increased the premium to reflect its compensation exposure to the other workers.

In the dissenting opinion, Justice David Prosser wrote that the Supreme Court's decision makes law by opining who qualifies as an employer and an employee in circumstances where the purported employees are undocumented workers, in this case illegal immigrants, and that setting this precedent would create uncertainty for employers and insurers.

Prosser noted that Olivas became an employer, whether he viewed it that way or not, when he agreed to get insurance so Ten Pas would hire him and the crew he represented. Prosser added that it was reasonable for Ten Pas to assume that when Olivas acquired liability protection for himself, he covered his crew as well and cited Olivas' testimony as proof he asked Acuity to cover the entire group.

Acuity could not be reached for comment.

Illegal status ignored

While the issue of illegal immigrants did not get as much attention from the court in the case as the more pressing issue of what defines an employer-employee relationship, it was a major reason the dispute happened in the first place.

Olivas was the liaison to a drywall contractor for a six-worker crew because he was the only one who spoke English and was documented.

"The 6,000-pound elephant in the room that everybody kind of brushed over was that the reason this was a joint venture (between Olivas and Steve Ten Pas of Ten Pas Drywall) was that some of these guys didn't have immigration papers," said Flores. "Ten Pas didn't want them on his payroll because he wasn't allowed to legally do that, but whatever Olivas did was then his responsibility."

Flores said many larger contractors employ illegal immigrants through the use of independent contractors.

"I think that's the way a lot of businesses are working around laws about hiring illegal immigrants," he said. "They want to hire them because they are good workers, but they don't want to have it traced back to them. So they hire an independent contractor and say he can hire whoever he wants."

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